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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/526,768	11/07/2005	Enno Klussmann	Gulde-0058	6937
23599	7590	08/05/2009	EXAMINER	
MILLEN, WHITE, ZELANO & BRANIGAN, P.C. 2200 CLARENDON BLVD. SUITE 1400 ARLINGTON, VA 22201			SWOPE, SHERIDAN	
			ART UNIT	PAPER NUMBER
			1652	
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AUG 05 2009

MILLEN, WHITE, ZELANO & BRANIGAN, P.C.
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ARLINGTON VA 22201

In re Application of:
Klussman et al. :
Serial No.: 10/526,768 : PETITION DECISION
Filed: November 7, 2005 :
Attorney Docket No.: **Gulde-0058** :

This is in response to the petition under 37 CFR § 1.181, filed July 20, 2009, requesting that the finality of the Office action of March 12, 2009 be withdrawn. Here it is assumed that applicants intend March 20, 2009 as this is the date the final Office action was mailed.

It is noted that applicants filed this petition under 37 CFR § 1.181 on July 20, 2009 requesting relief from the finality of the Office action mailed March 20, 2009. This petition was not filed within two months from the mailing of the final Office action and is thus untimely. Nevertheless, a decision on this petition is rendered herein.

BACKGROUND

Applicants filed a proper RCE on December 30, 2008 concurrently with traversals of the examiner's rejections and claim amendments.

In response to the RCE, the examiner mailed a final Office action on March 20, 2009 setting a three month statutory limit for reply. At the time of this final Office action claims 1-20 were pending in the application. Claims 6-8 and 11-17 were withdrawn from consideration. Claims 1, 3-5, 9, 10 and 20 were again rejected under 35 U.S.C. 112, first paragraph, enablement. Claims 4, 5, 9 and 10 were again rejected under 35 U.S.C. 112, second paragraph. Claims 18 and 19 were objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form.

In response thereto, applicants filed this petition under 37 CFR § 1.181 on July 20, 2009, requesting that the finality of the Office action of March 20, 2009 be withdrawn.

DISCUSSION

The petition and the file history have been carefully considered.

In the petition filed on July 20, 2009, applicants argue:

According to MPEP § 706.07(b):

"The claims of an application for which a request for continued examination (RCE) has been filed may be finally rejected in the action immediately subsequent to the filing of the RCE... where all the claims in the application after [filing the RCE] (A) are drawn to the same invention claimed in the application prior to [filing the RCE], and (B) would be properly finally rejected on the grounds and art of record in the next Office action if they had been entered in the application prior to filing of the RCE under 37 CFR 1.114" (*emphasis added*).

Applicants further point out that the claims were amended at the time of filing of the RCE to delete a functional activity from broader claim 1 and to recite a biochemical aspect of the polypeptides in claim 21. Here it is assumed applicants intended claim 20 as there is no claim 21. Applicants' further note that the 35 U.S.C. § 112, first paragraph, enablement rejection was "re-evaluated" in light of applicants' amendments to the claims.

Finally, applicants argue "With respect to (A), it is clear that *not all claims* are directed to the same invention claimed prior to entry of the RCE submission of December 30, 2008. Moreover, the Office Action has not establish that the claims would have been properly finally rejected on the grounds and art of record in the next Office action if they had been entered. Accordingly, the finality of the Office Action is improper, and should be withdrawn".

It is decided that applicants' arguments are found persuasive that the final Office action issued March 20, 2009 was premature and, therefore, finality of the Office action will be withdrawn.

DECISION

The petition is **GRANTED**.

The Office action mailed March 20, 2009 is hereby vacated. The amendment submitted June 20, 2009 is hereby entered. The application is being returned to the examiner for consideration of the amendment submitted June 20, 2009.

Should there be any questions about this decision please contact Marianne C. Seidel, by letter addressed to Director, TC 1600, at the address listed above, or by telephone at 571-272-0584 or by facsimile sent to the general Office facsimile number, 703-872-9306.



Remy Yucel
Director, Technology Center 1600